IN THE HIGH COURT OF BOMBAY AT PANAJI

Company Application No. 15 of 2007
in
Company Petition No. 19 of 2004

M/s. Vishwa Kutumb,
having office at 132,
Palace Cross Road,
Bangalore 560 020. .... Petitioner

V/s

M/s. Highpack Private Limited (in liquidation)
C/o. Shreeji Earthmovers,
Near old bridge,
Sanquelim, Goa – 403 505. .... Respondent

Mr. Vivek Rodrigues, Advocate for the Petitioner.

Ms. Amira Razaq, Advocate for the Applicant/Official Liquidator.

CORAM : **N.A. BRITTO, J.**
DATE : **20/07/2007**

ORDER :

Heard Shri Rodrigues, the learned Counsel on behalf of the petitioner and Ms. Razaq, the learned Counsel on behalf of the Official Liquidator.

2. The Respondent-Company was ordered to be wound up, by order dated 20/07/2006 and the Official Liquidator was directed to take over the charge of

the assets and liabilities of the Respondent-Company, except of some properties mentioned therein.

3. The Official Liquidator has filed an application, inter alia, for an order directing the petitioner to deposit a sum of Rs. 30,000/- with the Official Liquidator towards preliminary expenses such as Counsel's fees, Court Fees, Stamps, Stationery, Postage etc. Apprehending that there may not be sufficient assets left to meet the claim of the petitioner, the petitioner has sought the withdrawal of the petition unconditionally, and it is stated on behalf of the petitioner that as the petitioner is withdrawing the petition, the said amount is not required to be deposited.

4. As far as the withdrawal of the petition is concerned Rule 100 of the Companies (Court) Rules, 1959 (Rules, for short) provides that a petition for winding-up shall not be withdrawn after presentation without the leave of the Court. It also provides that an application for leave to withdraw the petition for winding-up which has been advertised in accordance with the provision of Rule 99 shall not be heard at any time before the date fixed in the advertisement for the hearing of the petition. Rule 101 provides for substitution of creditor or contributory for original petitioner. These provisions need not detain us for long. Needless to observe, Rule 100 of the

Rules deals with the stage prior to the petition is admitted and advertised. Section 447 of the Companies Act, 1956 (Act, for short) provides that an order for winding up of a company shall operate in favour of all the creditors and of all the contributories of the company as if it has been made on the joint petition, of a creditor and of a contributory. As far as this Section of the Act is concerned, this Court in the case of ***S.P. Capital Financing Ltd. V/s. Bagade (India) Engineering Ltd. (2002 Company Cases 657, Vol. 109),*** relied upon on behalf of the Official Liquidator, has held that as soon as the order of winding up is passed, the nature of the winding up petition undergoes a transformation from an individual petition to a petition on behalf of all the creditors and all the contributories. That being so, it will not be permissible for the petitioner to withdraw the petition as he would not have the consent of all the creditors or the contributories. Shri Rodrigues, on behalf of the petitioner, fairly concedes that in view of the said decision of this Court it would be impermissible for the petitioner now to withdraw the petition.

5. Nevertheless, Shri Rodrigues submits that the petitioner cannot be compelled to deposit the above said sum to meet the initial expenses and that all such expenditure has got to be met by the Official Liquidator from funds to be provided by the Central Government. As per Shri Rodrigues, Rule 292 of the Rules is inapplicable and what is applicable in the case at hand are the

provisions of Section 451(2) of the Act read with Rule 291 of the Rules. As per Shri Rodrigues, the petitioner could be asked to deposit the said sum indicated by the Official Liquidator only in the event that the Official Liquidator was acting as a Provisional Liquidator as contemplated by sub-rule (1) of Rule 291 of the Rules. As per Shri Rodrigues, the proviso to Rule 292 is not applicable in the case at hand and that might have been applicable only in case the petitioner has advanced any money to the Official Liquidator. In support of the submission, learned Advocate has placed reliance on a passage from ***Chairman and M.D., A.P. State Financial Corporation V/s. Southern Transformers And Electricals Ltd. (2000 CLC 1555)*** appearing on page 4791 of A. Ramaya's Guide to the Companies Act wherein it is stated as follows:

> When the winding up order is passed at the instance of BIFR, the secured creditors are not liable to pay the initial expenses incurred consequent upon winding up order. Proviso to R. 292 only provides for reimbursing the amount advanced to the Official Liquidator by the petitioner or a creditor or a contributory out of the assets of the Company on preferential basis. It does not cast a positive obligation on the part of the contributory to advance certain money towards preliminary expenses to the Official Liquidator. Even by necessary implication, it cannot be said that a duty is cast on a secured creditor like the petitioner who did not even make a request for winging up the company to advertise and advance the preliminary expenses. The possibility of subsequent reimbursement cannot be a ground to direct that the advance should initially be made by one of the secured creditors. In fact, Rule 292 of Companies (court) Rules makes a provision for incurring expenditure in connection with winding up with the leave of Court from out of permanent advance or other fund provided by Central Government. The Official Liquidator has to get sanction from the Regional Director, Department of

> Company Affairs, for each case if any expenses have to be met in order to implement the winding up order. If such preliminary expenses have a direct bearing for safeguarding the security which would otherwise be in peril, the Official Liquidator can require the secured creditor under the proviso to S. 529 to meet such expenses. Alternatively, when the secured creditor seeks leave of the court to remain outside the winding up proceedings and realize the security on his own, the Court can pass appropriate orders as regards the amount necessary to meet the cost incurred or likely to be incurred by the Official Liquidator in connection with preservation of security. But, such direction cannot be given even at the threshold of winding up, when the winding up is yet to be put into effect.

6. On the other hand, the learned Advocate Ms. Razaq on behalf of the Official Liquidator has submitted that the payment required to be made on behalf of the Official Liquidator has got to be made in terms of Rule 292 of the Rules and in support of this submission, learned Advocate has placed reliance on ***A.P. State Financial Corporation V/s. Southern Transformers Electricals Ltd. (2000 Company Cases 794, Vol. 100)*** wherein the Division Bench of the same Court (as in the case of ***Chairman and M.D., A.P. State Financial Corporation (Supra)***) stated as follows:

> We may mention that this problem as to defraying of initial expenses soon after the winding up order is passed is peculiar to the references made by the BIFR under section 20 of the Sick Industrial Companies (Special Provisions) Act. In other cases, while passing the winding up order, the court can direct the petitioners who are mostly creditors to advertise and advance the amount to meet initial expenses of official liquidator. However, that is not the position in the case of winding up at the instance of the BIFR unless of course a creditor intervenes and supports the reference.

7. Section 451 of the Act deals with general provisions as to liquidators and sub-section (2) thereof provides that where the Official Liquidator referred to in clause (c) of sub-section (1) of Section 448 becomes or acts as Liquidator, there shall be paid to the Central Government out of the assets of the Company such fees as may be prescribed. Rule 291 of the Rules deals with the fees to be credited to the Central Government, and, provides that in every winding-up where the Official Liquidator becomes or acts as Liquidator, there shall be paid into public account of India in the Reserve Bank of India to the credit of the Central Government from out of the assets of the Company in liquidation (or by the petitioner as provided in clause (1) below), the fees determined in accordance with the following provisions;

(1) Where the Official Liquidator acts as Provisional Liquidator only,

Such fees as the Court may consider reasonable, to be paid out of the assets of the company or by the petitioner as the Court may direct, in respect of the services of the Official Liquidator as Provisional Liquidator.

(2) Where a winding-up order is made and the Official Liquidator acts as liquidator of a company,

(i) Upon the total assets, including produce of calls on contributories, interest on investments, and rents from properties, realised or brought to credit by the Official Liquidator, after deducting sums on which fees are chargeable under clauses (3) and (4) below and the amount spent out of the money received in carrying on the business of the company, upon each years' collections,

On the first Rs. 10,000 or fraction thereof	3 per cent.
On the next Rs. 40,000 or fraction thereof	2 per cent.

On the next Rs. 50,000 or fraction thereof	1 per cent.
Above Rs. 1,00,000	¾ per cent.

(ii) .... etc.

8. Rule 292 of the Rules, on which reliance has been placed on behalf of the Official Liquidator, deals with cases where the company has no available assets. It provides that where a company against which a winding-up order has been made has no available assets, the Official Liquidator may with the leave of the Court, incur any necessary expenses in connection with the winding-up out of any permanent advance or other fund provided by the Central Government, and the expenses so incurred shall be recouped out of the assets of the company in priority to the debts of the company:

Provided that where any money has been advanced to the Official Liquidator by the petitioning or other creditor or contributory for meeting any preliminary expenses in connection with the winding-up, the Official Liquidator may incur any necessary expenses out of such amount, and the money so advanced shall be paid out of the assets of the company in priority to the debts of the company.

9. With reference to the first part of Rule 292 of the Rules, learned Counsel on behalf of the Official Liquidator, has submitted that there is no

permanent advance or other fund provided by the Central Government to the Official Liquidator and the Official Liquidator does not maintain any such account since it is the Registrar of companies who is declared by the Central Government as Ex-Officio Official Liquidator.

10. Section 451 of the Act even if it is read with Rule 291 of the Rules cannot come to the aid of the petitioner since what is contemplated therein is payment of fees or emoluments or the compensation for rendering services as the Official Liquidator, which is not the case at hand as what is sought to be asked for is certain sum to meet the initial expenditure to carry out the duties of the Official Liquidator. This is also not a case where the first part of Rule 292 of the Rules would be applicable since it is to nobody's case that the company against which the winding up order has been made has no available assets, and, in any event it would be premature to come to that conclusion and otherwise it can be seen from the order dated 28/07/2006 that the company has at least assets which are secured.

11. If the proviso below Rule 292 of the Rules makes a provision for refund of the amount paid, inter alia, by the petitioning creditor, I do not see any reason why the petitioning creditor could not be directed to deposit some amount so as to meet the preliminary expenses such as Court Fees, Stationary,

Postage etc. and which has been asked for by the Official Liquidator. The proviso below Rule 292 may not cast a positive obligation on the part of the petitioner to advance money towards preliminary expenses to the Official Liquidator, as observed in at page 4791 quoting ***Chairman and M.D. A.P. State Financial Corporation (supra)*** but if reimbursement can be made of the amount advanced to the Official Liquidator by the petitioning creditor, I do not see any reason as to why direction could not be issued to such a petitioning creditor to deposit certain amount to meet the initial expenses of the Official Liquidator as observed by the Division Bench of Andhra Pradesh High court, in ***Chairman and M.D. A.P. State Financial Corporation (supra),*** while passing the winding up order. The learned Division Bench has stated that the Court can direct the petitioners who are mostly creditors to advertise and advance the amount to meet initial expenses of Official Liquidator. That also could be done by virtue of the inherent powers of this Court saved under Rule (9) of the Rules in the absence of any prohibition in the Act and the Rules framed thereunder. After all it is only an advance which is sought for and which is being made to the Official Liquidator to meet the initial expenses and which would be recouped out of the assets of the company in liquidation in priority to the debts of the company.

12. Therefore, the Petitioner is hereby directed to initially deposit with the

Official Liquidator an amount of Rs. 15,000/- (Rupees fifteen thousand only) within a period of two weeks to enable the Official Liquidator to meet the initial expenses.

N.A. BRITTO, J.

NH/-